NEWARK COALITION FOR LOW INCOME HOUSING, et al.,
Plaintiffs,

v.

HOUSING AUTHORITY OF THE CITY OF NEWARK and MEL MARTINEZ, Secretary of Housing and Urban Development,
Defendants.

HOUSING AUTHORITY OF THE CITY OF NEWARK,
Third-Party Plaintiff-Movant,

v.

FAIR SHARE HOUSING CENTER, et al.,
Third-Party Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIIVIL ACTION NO. 89-1303

Hon. Dickinson R. Debevoise, U.S.D.J.

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**BRIEF OF THIRD-PARTY PLAINTIFF/MOVANT NEWARK HOUSING AUTHORITY IN SUPPORT OF ITS MOTION FOR TEMPORARY, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF STAYING CERTAIN NEW JERSEY APPELLATE DIVISION PROCEEDINGS ENTITLED IN RE ALLOCATION OF FEDERAL LOW INCOME HOUSING TAX CREDITS, DOCKET NO. A-1551-02T2 AND IN RE ADOPTION OF THE 2002 LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN, DOCKET NO. A-10-02T2, INSOFAR AS SUCH PROCEEDINGS APPLY TO THE NEWARK HOPE VI REVITALITION PLAN, INCLUDING THE WEST KINNEY GARDENS HOPE VI/LOW-INCOME HOUSING TAX CREDIT PROJECT**

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## PRELIMINARY STATEMENT

This action by Defendant/Third-Party Plaintiff Housing Authority of the City of Newark ("Newark Housing Authority" or "NHA") seeks temporary, preliminary and permanent injunctive relief staying certain New Jersey Appellate Division proceedings entitled In re Allocation of Federal Low Income Housing Tax Credits, Docket No. A-1551-02T2 and In re Adoption of the 2002 Low Income Housing Tax Credit Qualified Allocation Plan, Docket No. A-10-02T2 (hereafter the "State Court Proceedings"), insofar as such proceedings apply to the Newark Hope VI Revitalization Plan, including the West Kinney Gardens Hope VI/Low-Income Housing Tax Credit Project. As fully set forth herein, the requested injunctive relief is well within the scope of this Court's authority afforded by the All Writs Act, 28 U.S.C. § 1651, and manifestly satisfies the traditional four factors governing the grant of injunctions.

NHA has been subject to this Court's continuing jurisdiction since 1989. This Court has retained jurisdiction over this litigation, in part, in order to ensure that the rights of the former tenants of certain demolished NHA housing projects are protected and that the one-for-one replacement of lost public housing units proceed forward as expeditiously as possible. Pursuant to this continuing jurisdiction, this Court, by Consent Order dated May 25, 1999, ordered NHA to

> apply to HUD for a HOPE VI grant for the current year, and failing receipt of the grant, for the year 2000. In the event NHA fails to receive a HOPE VI grant in either the current year or in the year 2000, NHA will apply for such a grant in each year thereafter when such grants are available and NHA is eligible to receive a grant.

[Verified Complaint, Exhibit "C" (1999 Consent Order, ¶ IIIA(1)]

Consistent with this Court's Order, NHA applied for, and received, a $35 million Hope VI Revitalization Grant. Under the terms of the grant, NHA was required to seek other sources of public and private funds in order to finance a $150 million redevelopment plan. The Plan contemplates that NHA and private partners "will rebuild 755 units of low-rise ground-related mixed-income rental and homeownership housing in six areas totaling 42 acres spanning over a 60 block area in the Central Ward of Newark." )Verified Third Party Complaint, Exhibit "D".).

A key component of the Hope VI Revitalization Plan is the former Hayes Homes site, wherein a mixture of public and private financing will make possible the construction of 170 rental units. This phase of the revitalization plan is estimated to cost $47.5 million, of which $29 million is leveraged from the sale of low-income housing tax credits allocated to the private developer by HMFA. When completed, the residential project financed in part by the 2002 HMFA tax credit allocation will be known as "West Kinney Gardens."

The actual amount of tax credits allocated by HMFA to West Kinney Gardens in 2002 is $3,099,985, of which $2.1 million constitutes 2002 tax credit authority and the balance of $999,985 constitutes a binding commitment of HMFA's 2003 tax credit authority. (Verified Third Party Complaint, Exhibit "E".). By letter dated October 25, 2002, HMFA awarded these tax credits to the private developer of West Kinney Gardens, JS 2002 Urban Renewal, L.P. (hereafter "JS" or the "Developer"). Id.

Unfortunately, the pendency of the State Court proceedings challenging the HMFA's 2002 statewide tax credit allocations is preventing the developer of the West Kinney Gardens development project from closing on the necessary financing, and thereby from commencing construction. In turn, the inability to commence construction on the West Kinney Gardens project will have a cascading effect on NHA's overall compliance with the Hope VI redevelopment plan.

The State Court proceedings were brought by four public interest organizations based in southern New Jersey ("Appellants") challenging the HMFA's statewide allocation of tax credits. The Appellants contend that New Jersey's tax credit allocations to housing developments situated in urban areas of the State perpetuates and promotes racial segregation, in purported violation of Title VIII of the Civil Rights Act of 1968, various implementing federal regulations and other laws.

By this action, NHA, as Third-Party Plaintiff, seeks temporary, preliminary and permanent injunctive relief against the Appellants, including a stay of the State Court appellate proceedings, *but only to the extent that Appellants' claims therein affect the Newark Hope VI Revitalization Plan, including the West Kinney Gardens/Hope VI Project in the City of Newark that is already under this Court's jurisdiction.* NHA stresses that, if this Court were to grant the injunction here sought, Appellants would remain free to pursue all of their claims in State Court as against the NJHMFA 2002 tax credit regulation and as against the ten remaining developers of affordable housing

projects in New Jersey urban areas who were recipients of NJHMFA's 2002 award of tax credits.

As fully set forth in the annexed Verified Complaint and in the legal argument below, the pendency of the State Court proceedings is preventing NHA from effectively carrying out this Court's mandate, in its May 25, 1999 Consent Order, to proceed forward as expeditiously as possible with a replacement housing program for public housing units lost to demolition of the nonviable Stella Wright Homes and other nonviable high-rise public-housing developments. Further, the State Court proceedings effectively place on "hold" for an indeterminate period of time the continuing and vitally important process of transforming Newark's Central Ward into a stable and economically viable community.

For all of these reasons, as well as others fully set forth in the legal argument that follows, this Court properly should grant preliminary and permanent injunctive relief staying the State Court proceedings, insofar as such proceedings apply to the Newark Hope VI Revitalization Plan, including the West Kinney Gardens Hope VI/Low-Income Housing Tax Credit project.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Statement of Facts and Procedural History of this federal litigation are fully set forth in the Verified Third-Party Complaint and the Certification of Karen McLane Torian, and are incorporated herein by reference. See Verified Third Party Complaint, ¶¶ 8-20; Torian Cert., ¶¶ 1-29. The Statement of Facts and Procedural History of the State Court Proceedings are set forth below.

The State Court proceedings sought to be partially enjoined in this action arise from two separate appeals of administrative actions of the New Jersey Housing and Mortgage Finance Agency (HMFA) in connection with HMFA's administration and allocation of federal low-income housing tax credits to developers of affordable housing in New Jersey. See Verified Third Party Complaint, ¶ 21. The gravamen of the appeals is that New Jersey's tax credit allocations to housing developments situated in urban areas of the State perpetuates and promotes racial segregation.

By way of background to the appeals, we describe briefly the statutory scheme governing the allocation of low-income housing tax credits. Such tax credits are authorized by federal statute and are intended as one means of subsidizing the construction of affordable housing. 26 U.S.C. § 42. Each year, the United States Internal Revenue Service allots to every state a certain amount of low income housing tax credits ("tax credits"). 26 U.S.C. § 42. The developers of the projects can use the tax credits to offset their own federal income tax or can sell the credits to investors and use the capital generated by the sale to fund the housing project.

In New Jersey, the HMFA has the authority to allocate the federal tax credits to affordable housing projects. Executive Order 162 (Kean 1987) Tax credits may be allocated only to "qualified low income housing projects," in which at least 40% of the units are rented to persons earning 60% or less of area median income, or 20% of the units are rented to persons earning 50% or less of area median income. 26 U.S.C. § 42(g) (1).

States are required by federal statute to adopt a "qualified allocation plan" pursuant to which tax credits are allocated. 26 U S C § 42(m) (1) (A) (i) The HMFA promulgates its plan each year in the form of a regulation See N.J.A.C. 5.80 33 1 et seq. The regulation setting forth the 2002 allocation plan has been challenged by Appellants in one of their appeals.

Pursuant to federal statute, the tax credit "qualified allocation plan" must give preference in allocating credits to "projects serving the lowest income tenants; projects obligated to serve qualified tenants for the longest periods; and projects which are located in qualified census tracts . . . and the development of which contributes to a concerted community revitalization plan." 26 U.S.C. § 42(m) (1) (B) (ii) (I), (II), and (III) . A "qualified census tract" is one in which "50 percent or more of the households have an income which is less than 60 percent of the area median gross income." 26 U.S.C. § 42(d) (.5) (C) (ii) (I). Additionally, pursuant to State executive order, the HMFA gives priority to projects receiving funding from State housing programs. (Executive Order 162 (Kean 1987).

The HMFA revises its plan each year to incorporate changing local

conditions or State policies, while still giving preference to projects in accordance with the federal statute. The 2002 plan included changes in funding levels for the four project categories or classifications in which allocations would be made. 34 N.J.R. 47(a) (January 7, 2002). Those categories are Urban, Suburban/Rural, HOPE VI and Special Needs. Ibid. Allocation of a designated amount of tax credits in each category is termed a "Cycle." There are two additional allocations made, in the Reserve Cycle and the Final Cycle, for which projects in any of the categories, Urban, Suburban/Rural, HOPE VI, or Special Needs, may compete for awards of additional tax credits.

The 2002 plan was amended to increase the amount of allocations designated for suburban or rural projects and decrease the amount designated for urban projects. See e.g., 34 N.J.R. 1579 (May 6, 2002). In addition, the 2002 plan gave priority to projects that incorporate commercial revitalization in distressed neighborhoods. Ibid. This was intended to encourage development consistent with State Planning Commission policy. Ibid.

The HMFA Tax Credit Committee allocates tax credits pursuant to the allocation plan. N.J.A.C. 5:80-33.24. On September 13, 2002, the HMFA Tax Credit Committee held an open public meeting and allocated tax credits in the Urban, Suburban/Rural, HOPE VI, and Special Needs Cycles. The Tax Credit Committee met again on October 25, 2002, and allocated the remaining tax credits in the Reserve and Final Cycles.

Appellants Fair Share Housing Center, Camden County Branch of NAACP, Southern Burlington County NAACP, and Camden City Taxpayers

Association (collectively "Appellants") have filed two separate appeals in the New Jersey Appellate Division of actions taken by the HMFA in connection with the 2002 adoption and award of Federal Low-Income Housing Tax Credits One appeal challenges an HMFA regulation implementing New Jersey's 2002 tax credit program. See In re Adoption of the 2002 Low Income Housing Tax Credit Qualified Allocation Plan, Docket No. A-lO-02T2. The other appeal challenges the HMFA's tax credit allocations to eleven affordable housing projects in New Jersey's urban areas. See In re Allocation of Federal Low Income Housing Tax Credits Under the Urban, Hope VI, and Final Cycles Pursuant to the 2002 Low Income Housing Tax Credit Qualified Allocation Plan, Docket No. A-1551-02T2. The two appeals are hereafter individually referred to by their respective docket numbers and collectively referred to as the "Appeals."

Specifically, Docket No. A-1551 02T2 challenges seven affordable housing projects in the Urban Cycle, located in Trenton (Mercer County); Orange (Essex County); Bridgeton (Cumberland County); Tinton Falls (Monmouth County); Paterson (Passaic County); Union City (Hudson County); and Newark (Essex County). The three HOPE VI affordable housing projects in the HOPE VI Cycle are located in Bridgeton (Cumberland County); Elizabeth (Union County), and Jersey City (Hudson County). Ibid. The one affordable housing project in the Final Cycle is located in Newark (Essex County).

The last of the above referenced projects hereafter referred to as West Kinney Gardens – is the only project within the scope of the continuing

jurisdiction of this Court in this litigation. In this action, Defendant NHA is seeking preliminary and permanent injunctive relief staying the State Court proceedings, *only insofar as such proceedings apply to the West Kinney Gardens Hope VI/low-income housing tax credit project and the Newark Hope VI project in general*.

Appellants filed their appeal under Docket No. A-10-02T2 challenging the HMFA 2002 tax credit regulation on August 28, 2002. On November 20, 2002, Appellants filed their separate appeal challenging the HMFA's tax credit allocations to eleven affordable housing projects in New Jersey's urban areas. Because the second appeal was untimely under New Jersey's period of limitations for challenging administrative actions of state agencies, see R. 2:4-1(b), Appellants filed a motion for leave to file an out of time appeal That motion was granted by the New Jersey Appellate Division by order dated December 16, 2002. (Verified Third Party Complaint, Exhibit "G" )

The parties to the appeals have engaged in, and continue to engage in, extensive motion practice. Appellants moved to consolidate the two appeals By order dated December 16, 2002, the Court denied the motion, although the Court ordered that the appeals be "calendered back-to-back." (Verified Third Party Complaint, Exhibit "G".). On January 24, 2003, Respondent HMFA, joined by five co-respondent developers, moved to summarily dismiss the appeal under Docket No. A 1551 02T2 on the ground that Appellants lack standing to bring the appeal. By order dated February 18, 2003, the Court denied the motion (Verified Third Party Complaint, Exhibit "H".). On January

27, 2003, one co respondent developer, later joined by others, filed a motion to accelerate the briefing, argument and decision of the appeal under Docket No. A 1551-02T2. By order dated February 18, 2003, the Court denied the motion. (Verified Third Party Complaint, Exhibit "I" ).

As a consequence of the Appellate Division's rulings, the two appeals will be subject to full briefing and argument on the merits *on a non accelerated basis*. The most recent Appellate Division scheduling order sets down a date of May 19, 2003 as the date of the last merits brief to be filed in Docket No. A-1551-02T2. (Verified Third Party Complaint, Exhibit "J" ). No date for oral argument has yet been fixed by the Appellate Division in either appeal. The typical lapse of time between the date of the submission of the last merits brief and the date of oral argument *in a non-accelerated case* before the New Jersey Appellate Division is currently six to eight months. (Verified Third Party Complaint, ¶ 28.). It is, of course, impossible to predict the lapse of time between the date of oral argument and the date of the Court's decision in the two appeals. Based on the foregoing, the Appellate Division's resolution of the two appeals almost certainly will not take place before early 2004 Id , ¶ 30.

Recently, Appellants filed a motion with the Appellate Division seeking an order remanding temporarily the two appeals to the Law Division for development of a factual record. (Verified Third Party Complaint, Exhibit "K") (Appellants' motion dated March 15, 2003). In particular, Appellants seek a remand for development of a record

> regarding (a) the demographics of projects funded by HMFA's administration of Federal Low Income Housing Tax Credits from

> 1987 to 2001 and regarding the demographics of projects allocated tax credits pursuant to the 2002 QAP, and (b) a factual record that includes evidence establishing' and contesting the legitimacy or the HMFA interests and the existence of reasonable and non-discriminatory alternatives; (2) alternatively, an order permitting appellants leave to refer to information outside the record in their merits brief to demonstrate the weakness of the administrative record and the results of the failure of HMFA to consider the racial impact of its funding decisions
>
> [Verified Third Party Complaint, Exhibit "K"]

The motion remains pending as of the current date Suffice it to say that if the Appellate Division were to grant the portion of Appellants' motion seeking temporary remand to the New Jersey Superior Court Law Division for development of a record, then the Appellate Division's ultimate resolution of the two appeals would almost certainly be delayed for many additional months beyond the early 2004 date set forth above as the earliest possible resolution by the Appellate Division of the merits of the appeals

## LEGAL ARGUMENT

## POINT I

**DEFENDANT NHA IS ENTITLED TO TEMPORARY, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF STAYING THE STATE COURT PROCEEDINGS IN THE NEW JERSEY APPELLATE DIVISION ENTITLED IN RE ALLOCATION OF FEDERAL LOW INCOME HOUSING TAX CREDITS, DOCKET NO. A-1551-02T2, INSOFAR AS SUCH PROCEEDINGS APPLY TO THE NEWARK HOPE VI REVITALIZATION PLAN, INCLUDING THE WEST KINNEY GARDENS HOPE VI/LOW-INCOME HOUSING TAX CREDIT PROJECT**

### A. A stay of the State Court proceedings is within the scope of this Court's authority pursuant to the All Writs Act and is not precluded by the Anti-Injunction Act

The All Writs Act, 28 U.S.C. § 1651, provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Id. The power granted by the All Writs Act is limited by the Anti-Injunction Act, 28 U.S C. § 2283, which prohibits, with certain specified exceptions, injunctions by federal courts that have the effect of staying a state court proceeding.

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings 'in a State court except as expressly authorized, by Act of Congress, or where necessary in aid of its jurisdiction, or to. protect or effectuate its judgments.
>
> [28 U.S.C. § 2283]

The Third Circuit has observed that the All-Writs Act "acts in concert" with the Anti-Injunction Act "to permit the issuance of an injunction [against a state court proceeding]." In Re GMC Pick-Up Truck Liability Litigation, 134 F.3d 133, 143 (3d Cir. 1998). Thus, while the Anti Injunction Act does not

provide positive authority for issuance of injunctions, it describes those situations where injunctions are not permitted. In re Prudential Ins. Co. Sales Practice Litigation, 261 F.3d 355, 365 (3d Cir. 2001). The All Writs Act, by contrast, grants the federal courts the authority to issue injunctions where necessary in aid of their jurisdiction. The parallel "necessary in aid of jurisdiction," language is construed similarly in both the All-Writs Act and the Anti-Injunction Act. Carlough v Amchem Products, Inc., 10 F.3d 189, 201 (3d Cir.1993).

The Anti Injunction Act, by its terms, sets forth three specifically defined exceptions to its general prohibition against enjoining state court proceedings.[1] See 28 U.S.C. § 2283 (excepting from Act's general prohibition those injunctions that as expressly authorized "by Act of Congress, or where necessary in aid of [the federal court's] jurisdiction, or to protect or effectuate [the federal court's] judgments") In addition, the Supreme Court has recognized a further exception to the preclusive effect of the Act that is not set forth in the text of the Act itself. See County of Imperial v. Munoz, 449 U.S. 54, 59-60 (1980) (holding that Anti-Injunction Act does not prohibit *third parties* from seeking to enjoin a state proceeding with a federal injunction).

Here, as set forth below, the injunctive relief sought by the Movant is

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[1] Although the All Writs Act only expressly refers to only one of the three exceptions set forth in the Anti-Injunction Act, courts nevertheless have held that where an injunction comes within one of the exceptions of the Anti-Injunction Act, "it is within the court's power to issue the injunction under the All Writs Act." Atlantic Coast Demolition and Recycling, Inc. v. Bd. of Chosen Freeholders of Atlantic County, 988 F. Supp. 486, 491-92 (D.N.J. 1997). See also In Re GMC Pick-Up Truck Liability Litigation, 134 F.3d at 143 ("If an injunction falls within one of the three exceptions [of the Anti-Injunction Act], the All Writs Act provides the positive authority to federal courts to issue injunctions of state court proceedings.")

within the positive grant of authority afforded by the All Writs Act and is within not one, but two, of the three statutory exceptions of the Anti Injunction Act, as well as the exception to the latter Act recognized by the Supreme Court in Munoz.

**1. This court's issuance of an injunction against the State Court proceeding is "necessary in aid of its jurisdiction," consistent with both an express exception to the Anti-Injunction Act as well as the affirmative grant of authority afforded by the All Writs Act**

As previously noted, the express language of the Anti-Injunction Act excepts from its general prohibition those injunctions "necessary in aid of [a federal court's] jurisdiction." 28 U.S.C § 2283. This exception, the Supreme Court teaches, means that an injunction may be issued where "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." Atlantic Coast. Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S 281, 295 (1970). The exception thus parallels the federal courts' power under the All Writs Act "to issue such commands ... as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." United States v. New York Telephone, 434 U.S. 159, 173 (1977).

The "aid of jurisdiction" exception to the Anti Injunction Act has been applied most frequently in complex litigation implicating the public interest, including, for example, multidistrict class action litigation, see Carlough v. Amchem Products, Inc , 10 F.3d at 203-04, and school desegregation cases, see In re Prudential Ins. Co. Sales Practice Litigation, 261 F.3d at 365 (quoting

Winkler v. Eli Lilly & Co., 101 F 3d 1196, 1202 (7th Cir. 1996)). See also Swann v. Charlotte Mecklenberg Bd. of Education, 501 F.2d 383, 384 (4th Cir. 1974) (affirming district court injunction of state court action interfering with district court's continuing jurisdiction over school desegregation); Oliver v. Kalamazoo Bd of Education, 510 F.Supp 1104, 1107-08 (W.D. Mich. 1981) (applying exception to Ant-Injunction Act and entering injunction against state count action in school desegregation matter). Thus, for example, in the context of school desegregation, "where a federal court's jurisdiction continues until desegregation is achieved, courts have allowed federal injunctions to stay state proceedings that would interfere with this jurisdiction." Garcia v. Bauza-Salas, 862 F. 2d 905, 909 (1st Cir. 1988)

For several reasons, the "aid in jurisdiction" exception to the Anti-Injunction Act and the concomitant positive grant of authority under the All Writs Act plainly applies to the injunctive relief sought in this case.

*First*, as this Court is well aware, this case much like a school desegregation case involves the exercise of federal judicial authority over a sustained period of time to ensure that a comprehensive and complex settlement of a matter of public importance affecting many parties and interests is carried through to its conclusion. This Court has expended years of effort seeking to ensure that adequate replacement public housing would be available to Newark's neediest residents. This case is precisely the type of case for which the relief requested is both necessary and appropriate.

*Second*, as fully developed in the Verified Third Party Complaint, the

proposed injunction is "necessary [and] appropriate to effectuate and *prevent the frustration of [this Court's] orders* it has previously issued in its exercise of jurisdiction otherwise obtained." United States v New York Telephone, 434 U.S. at 173 (emphasis added) Quite simply, the State Court litigation, if permitted to proceed, will frustrate this Court's continuing efforts to ensure decent replacement housing for thousands of Newark's neediest residents. The frustration of this Court's efforts will be accomplished simply by the mere existence of the State Court litigation, which will prevent the commencement of construction, in the foreseeable future, of an essential component of the NHA's Hope VI Development Plan. As fully set forth in the Verified Third Party Complaint, the existence of the State Court proceeding has placed a "cloud" over the Low-Income Housing Tax Credit component of Phase I of the Hope VI Development Plan, thereby threatening to undercut the entire Hope VI Development Plan. Verified Third Party Complaint, ¶¶ 20, 35-42

For these reasons, the record on this motion plainly satisfies the "aid in jurisdiction" provisions of the Ant Injunction Act and the All Writs Act, in that the State Court proceeding here at issue, if not enjoined, will have the effect of "frustrat[ing]" this court's continuing jurisdiction over the NHA's construction of replacement housing, the implementation of the Hope VI development project and related matters.

**2. This Court's issuance of an injunction against the State Court proceeding is necessary "to protect or effectuate its judgments," consistent with another express exception to the Anti-Injunction Act**

As previously noted, the Anti-Injunction Act, by its terms, also excepts

from its general prohibition those injunctions that are necessary "to protect or effectuate [a court's] judgments." 28 U.S.C § 2283 This provision, known as the "relitigation exception," Chick Kam Choo v. Exxon, 486 U S. 140, 147 (1988), was intended "to permit a federal court to prevent state litigation of an issue that previously was presented to, and decided by, the federal court," id at 147.

This second statutory exception to the Anti-Injunction Act is closely related to the Act's "aid in jurisdiction" exception Not surprisingly, the proposed injunction of the State Court proceeding falls squarely within this exception as well.

Here, the principal claim presented in the State Court proceeding sought to be enjoined is precisely the same claim that was presented to this Court in the original complaint in this action, i.e., the assertion in Paragraphs 46(e)(ii), 66, 71 and 74 of the Complaint in this action that Defendants NHA and HUD allegedly failed to comply with Title VIII of the Civil Rights Act of 1968 [2] and various implementing federal regulations by failing to take measures that would promote racial desegregation in housing. By way of comparison, the Appellants' federal claim in the State Court proceeding is that the New Jersey Housing and Mortgage Finance Agency (HMFA) failed to comply with Title VIII of the Civil Rights Act of 1968 and various implementing federal regulations by failing to "promote and seek out opportunities for racial integration" and, in

[2] The Original Complaint in this litigation erroneously refers to the referenced statute as "Title VIII of the Fair Housing Act." Note that Title VIII of the Civil Rights Act **is** the "Fair Housing Act " Thus, the referenced statue can be referred to as either Title VIII of the Civil Rights of 1968 or as the Fair Housing Act, but not as Title VIII of the Fair Housing Act

particular, by "reserv[ing] tax credits for developments in the Urban, Hope VI and Final Cycles in contravention of its obligation to affirmatively promote fair housing." (Verified Complaint, Exhibit "B", Appellants' Civil Case Information Statement in State Court Proceeding).

As this Court is well aware, this Court has entered various consent judgments and orders[3] in this litigation that have comprehensively addressed and settled the claims brought by the Plaintiffs, including the claims that Defendants NHA and HUD allegedly failed to comply with Title VIII of the Fair Housing Act of 1968. Thus, the State Court Appellants' Title VIII claims, as applied to the West Kinney Gardens project subject to this Court's jurisdiction, constitutes an attempt to raise an issue "that previously was presented to, and decided by, [this Court]." Chick Kam Choo v. Exxon, 486 U.S. at 147. Hence, Appellants' State Court proceeding falls squarely within the "relitigation exception" to the Anti-Injunction Act, which, as previously noted, expressly permits a federal court to enjoin a state court proceeding when, as here, the injunction is necessary "to protect or effectuate [a court's] judgments." 28 U.S.C. § 2283.

**3. In any event, because the Movant is not a party to the State Court Litigation, the Anti-Injunction Act, consistent with the Supreme Court's**

[3] That this Court's rulings in this litigation are in the nature of consent judgments and orders -- as distinct from traditional adjudications -- has no effect on the proper application of the relitigation exception to this motion. This is so, because (1) the relitigation exception "is founded in the well-recognized concepts of res judicata and collateral estoppel," Chick Kam Choo v. Exxon, 486 U.S. at 147, and (2) it is well established that a "[consent] decree possesses the same force with regard to res judicata and collateral estoppel as a judgment entered after a trial on the merits." Interdynamics, Inc. v. Firma Wolf, 653 F.2d 93, 96 (3d Cir. 1981) (citing Harding v. Harding, 198 U.S. 317 (1905), Burgess v. Seligman, 107 U.S. 20 (1882)).

**decision in Munoz, applies not at all to this motion for injunctive relief**

Long ago, the Supreme Court held that the Anti Injunction Act does not prohibit *third parties* from seeking to enjoin a state court proceeding with a federal injunction. See Hale v. Bimco Trading, Inc., 306 U.S. 375, 377 78 (1939); see also Hill v. Martin, 296 U.S. 393, 403 (1935) More recently, the Supreme Court reaffirmed this judicially imposed exception to the Anti-Injunction Act See County of Imperial v. Munoz, 449 U.S. 54, 101 (1980). The exception has become known as the "stranger to the litigation" doctrine. Frank Russell Co. v. Wellington Management Co., 154 F.3d 97, 106 (3d Cir. 1998) (citing County of Imperial v. Munoz, 449 U S at 101). See also United States Steel Corp. v. Musiko, 885 F.2d 1170, 1178 79 (3d Cir. 1989).

Movant NHA is a "stranger" to the State Court proceeding sought to be enjoined in this action So too are all other parties in the federal. As more fully set forth in the Verified Third Party Complaint, the State Court proceeding is between four non profit organizations based in southern New Jersey, as appellants, and the New Jersey Housing and Mortgage Finance Agency and 11 not for-profit and for profit housing developers, as respondents. (Verified Third Party Complaint, ¶¶ 1-5, 21.). None of the appellants and respondents in the State Court proceeding is a party in the instant. Hence, consistent with the Supreme Court's decision in Munoz, the preclusive effect of the Anti-Injunctive Act applies not at all to this action seeking to enjoin the State Court litigation, because the Movant (and indeed all parties to this action) are "strangers" to the State Court litigation

**B. The Younger abstention doctrine has no application to this motion**

Because the proposed injunction would apply to ongoing state court proceedings, this Court must consider the potential application of the doctrine of abstention first recognized in Younger v. Harris, 401 U.S. 37 (1971). As set forth below, the Younger abstention doctrine has no application to the proposed injunction.

Under Younger, an abstention may be warranted only when "(1) there is an ongoing state judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere; (2) the state proceeding implicates an important state interest; and (3) the state proceedings must afford an adequate opportunity to raise the [federal] claims." FOCUS v. Allegheny Court of Common Pleas, 75 F 3d 834, 842 (3d Cir. 1996). Here, the first prong of the Younger test is plainly inapplicable, since none of the plaintiffs in the instant proceeding is a party to the State Court proceeding for which an injunction is here sought. Younger is thus inapplicable for this reason alone

Nor does the state court proceeding raise "an important state interest," in light of the fact that that the Appellants' claims in the State Court proceeding are almost entirely claims based on federal law (See Verified Complaint, Exhibit "F", Appellants Civil Case Information Statement). Every single one of the Appellants' seven counts in their Appellate Civil Case Information

Statement is based in whole, or in part, on federal law. [4] Id.

Furthermore, the preliminary and permanent injunction sought in this action would not, in any event, affect any of the Appellants' federal as well as State Law claims in State Court, *except to the extent that Appellants' claims affect the Newark Hope VI Revitalization Plan, including the West Kinney Gardens/Hope VI Project in the City of Newark.*. If this Court were to grant the injunction here sought, Appellants would remain free to pursue all of their claims in State Court as against the NJHMFA 2002 tax credit regulation and as against the ten remaining developers of affordable housing projects in New Jersey urban areas who were recipients of NJHMFA's 2002 award of tax credits The effect of the proposed injunction, if granted, would be merely to sever from Appellants' state court action the Newark Hope VI project, one of the twelve named respondents and one of the eleven tax credit projects that Appellants are seeking to prevent from going forward.

Viewed from this perspective, even assuming an "important state interest" were to have been raised by the State court proceeding which we submit has not been raised -- the proposed injunction, if granted, nevertheless would have no effect on the purported state interest. Appellants are free to vigorously pursue their purported state interest in the existing State Court proceeding. Thus, the Younger abstention doctrine has no application to this

[4] Two of the seven claims set forth in Appellants' Civil Case Information Statement make passing reference to New Jersey law as well as Federal law The two claims that make partial reference to New Jersey law do no more than reference "the Mount Laurel Doctrine" and the "state constitution" without setting forth any particular elements of the purported constitutional causes of action for which a violation is claimed

action for this reason alone.

**C. This action for preliminary injunctive relief against the State Court proceeding satisfies the traditional four factors governing the grant of injunctions.**

It is, of course, well established in this Circuit that four factors govern a district court's decision whether to issue a preliminary injunction. These factors are: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest. Allegheny Energy, Inc. v DQE, Inc., 171 F. 3d 153 (3d Cir. 1999) (citing American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1477 n. 2 (3d Cir. 1996) (en banc),. Council of Alternative Political Parties v Hooks, 121 F.3d 876, 879 (3d Cir 1997)). A district court should endeavor to "balance[] these four .. factors to determine if an injunction should issue." American Civil Liberties Union of New Jersey, 84 F.3d at 1477, n. 2.

Here, as fully set forth below, the record establishes that the foregoing four factors are satisfied in favor of the Movant Accordingly, a preliminary injunction against the State Court proceeding should issue Id

**1. For many reasons, NHA's probable success on the merits of this action is established on this record**

As previously noted, the All Writs Act, 28 USC § 1651, confers upon federal courts the authority "to issue such commands ... as may be necessary or appropriate to effectuate and prevent the frustration of orders it has

previously issued in its exercise of jurisdiction otherwise obtained." United States v. New York Telephone, 434 U.S. 159, 173 (1977). See also Anti-Injunction Act, 28 U S C § 2283 (excepting from statutory general prohibition against federal court injunctions of state court proceedings those injunctions "necessary in aid of [a federal court's] jurisdiction.") As fully discussed in Point IA, the proposed injunction falls squarely within the affirmative grant of authority afforded by the All Writs Act.

Quite simply, the State Court litigation, if permitted to proceed, will frustrate this Court's continuing efforts to ensure decent replacement housing for thousands of Newark's neediest residents The frustration of this Court's efforts will be accomplished simply by the mere existence of the State Court litigation, which will prevent the commencement of construction, in the foreseeable future, of an essential component of the NHA's Hope VI Revitalization Plan. (Verified Complaint, ¶¶ 20, 37.). Thus, the record on this action plainly satisfies the "aid in jurisdiction" provisions of the All Writs Act and the Anti-Injunction Act, in that the State Court proceeding here at issue, if not enjoined, will have the effect of "frustrat[ing]" this court's continuing jurisdiction over the NHA's construction of replacement housing, the implementation of the Hope VI development project and related matters

In addition to the foregoing, Appellants' federal claim in the State Court litigation is, in substance, identical to several claims that were presented to this Court in the original complaint in this action. In particular, Appellants' federal claim mirrors the assertion in Paragraphs 46(e)(ii), 66, 71 and 74 of the

Complaint in this action that Defendants NHA and HUD allegedly failed to comply with Title VIII of the Civil Rights Act of 1968 and various implementing federal regulations by failing to take measures that would promote racial desegregation in housing. (Verified Third Party Complaint, Exhibit "A" Original Complaint in this action dated 3/28/89). As to these claims and all remaining claims brought by the Plaintiffs in their original Complaint in this litigation, this Court has entered various consent judgments and orders that have comprehensively addressed and settled the claims and issues arising under Title VIII.

It would serve no useful purpose for the State Court (or this Court) to re-litigate Appellants' Title VIII claim as applied to the Newark Hope VI Revitalization Plan, including the West Kinney Gardens, when that very claim already was comprehensively addressed by this Court and made the subject of a Consent Judgment and Orders as applied to all aspects of NHA's plans and programs. (Verified Third Party Complaint, Exhibits "B" and "C" Orders dated August 17, 1989 and May 25, 1999). Moreover, the Consent Judgment and Orders are binding as to both the facts and the law with respect to at least the parties to this proceeding and the additional parties in their privity, in view of the fact that a "[consent] decree possesses the same force with regard to res judicata and collateral estoppel as a judgment entered after a trial on the merits." Interdynamics, Inc. v Firma Wolf, 653 F.2d 93, 96 (3d Cir 1981) (citing Harding v. Harding, 198 U.S. 317 (1905); Burgess v. Seligman, 107 U.S. 20 (1882)).

Thus, the State Court Appellants' Title VIII claims, as applied to the Newark Hope VI Project and specifically the West Kinney Gardens project subject to this Court's jurisdiction, constitutes an attempt to raise an issue "that previously was presented to, and decided by, [this Court]." Chick Kam Choo v. Exxon, 486 U S at 147 Hence, Appellants' State Court proceeding falls squarely within the "relitigation exception" to the Anti-Injunction Act, which, as previously noted, expressly permits a federal court to enjoin a state court proceeding when, as here, the injunction is necessary "to protect or effectuate [a court's] judgments." 28 U.S.C. § 2283.

Finally, the NHA's position on the merits of this action is further buttressed by the fact that Title VIII compliance of the West Kinney Gardens development project (as well as the St. James Estates development project that is part of the Newark Hope VI plan) was properly carried out, as a matter of law, by HUD's administrative review and approval of the NHA's application for a HOPE VI grant. (Torian Cert., ¶ 14.). In particular, HUD's review of the subject HOPE VI application includes a review under 24 C.F.R. § 941.202, see 24 C.F.R. § 941.602(a)(3) (incorporating by reference the requirements of Title VIII compliance set forth in 24 C F.R. § 941.202), the very federal regulation that Appellants in the State Court proceeding allege that *HMFA* failed to carry out with respect to West Kinney Gardens as well as ten other proposed housing projects that received allocations of tax credits from HMFA Whatever the merits of the Appellants' Title VIII claims against HMFA with respect to the *non-Hope VI tax credit projects*, those putative claims are, in any event, preempted

as applied to West Kinney Gardens (as well as St. James Estates), since HUD itself not HMFA is entrusted with Title VIII compliance in connection with its review and approval of a Hope VI/Low income Housing Tax Credit Project See 24 C F.R. § 941.602(a)(3).

In short, NHA's probable success on the merits of this matter is conclusively established by *any one* of three separate and distinct legal theories.

**2. In the absence of a preliminary injunction against the State Court proceeding, NHA will suffer irreparable harm**

As previously noted, this Court, by Consent Order dated May 25, 1999, ordered NHA to

> apply to HUD for a HOPE VI grant for the current year, and failing receipt of the grant, for the year 2000 In the event NHA fails to receive a HOPE VI grant in either the current year or in the year 2000, NHA will apply for such a grant in each year thereafter when such grants are available and NHA is eligible to receive a grant.
>
> [Verified Third Party Complaint, Exhibit "C" (1999 Consent Order, ¶ IIIA(1)]

Consistent with this Court's Order, NHA applied for, and received, a $35 million Hope VI Revitalization Grant. (Verified Third Party Complaint, ¶ 11 ). Under the terms of the grant, NHA was required to seek other sources of public and private funds in order to finance a $150 million redevelopment plan. The Plan contemplates that NHA and private partners "will rebuild 755 units of low rise ground related mixed-income rental and homeownership housing in six areas totaling 42 acres spanning over a 60 block area in the central Ward of Newark." (Verified Third Party Complaint, Exhibit "D" ).

A key component of the Hope VI redevelopment plan is the former Hayes Homes site, wherein a mixture of public and private financing will make possible the construction of 170 rental units. This phase of the redevelopment plan is estimated to cost $47 5 million, of which $29 million is leveraged from the sale of low-income housing tax credits allocated to the private developer by HMFA. (Verified Third party Complaint, ¶ 15 ). When completed, the residential project financed in part by the 2002 HMFA tax credit allocation will be known as "West Kinney Gardens."

The actual amount of tax credits allocated by HMFA to West Kinney Gardens in 2002 is $3,099,985, of which $2.1 million constitutes 2002 tax credit authority and the balance of $999,985 constitutes a binding commitment of HMFA's 2003 tax credit authority (Verified Third Party Complaint, Exhibit "E".). By letter dated October 25, 2002, HMFA awarded these tax credits to the private developer of West Kinney Gardens, JS 2002 Urban Renewal, L.P. (hereafter "JS" or the "Developer"). Id

All public and private sources of financing have been secured to enable the developer to commence construction on West Kinney Gardens by as soon as next month. (Verified Third Party Complaint, ¶ 19. ). But the pendency of the appeals before the Appellate Division is preventing, and will prevent, the developer from closing on the necessary financing, and thereby from commencing construction on West Kinney Gardens Id , ¶ 20. In short, the existence of the State Court proceedings has placed a "cloud" over the Low Income Housing Tax Credit component of the West Kinney Gardens project,

thereby preventing the project from proceeding in accordance with its financing and construction schedule.

In turn, the inability to commence construction on the West Kinney Gardens project will have a cascading effect on NHA's overall compliance with the Hope VI Revitalization Plan, thereby irreparably harming NHA. The West Kinney Gardens project -- as the first phase of the Hope VI Revitalization Plan - was scheduled to begin in April 2003 and to be completed by approximately November 2004 with full occupancy expected to take place by February 2005. Absent this Court's intervention in the form of a stay of the State Court proceedings, the commencement of construction of the West Kinney Gardens Project necessarily will be delayed until a favorable conclusion of the State Court proceedings, which, in their present procedural posture, will not occur until early 2004, at the very earliest (Verified Third Party Complaint, ¶¶ 30, 34.). The holding back of this key component of Phase I of the Hope VI Revitalization Plan will adversely effect the construction staging of subsequent phases of the Hope VI project, with the consequence that the entire Hope VI project is placed at risk [5]

Such a scenario is real, not speculative The Hope VI Grant Agreement dated April 19, 2000 contains as a condition that NHA

> commence activities within 18 months from the date of HUD's written approval of the Revitalization Plan, but in no event may

[5] The second phase of the Hope VI Revitalization Plan includes the construction of St. James Estates, which will include 158 rental units and 72 homeownership units Torian Cert., ¶ 18. That project contemplates the use of tax credit financing. If a permanent injunction is not entered against Third Party Defendants with respect to the Newark Hope VI Revitalization Plan, then the future financial viability of the St. James Estates project threatened as well.

> such time period exceed 24 months from the date of execution of the Grant Agreement. Completion of construction must be accomplished within 48 months from the date of HUD's written approval of the Revitalization Plan, but in no event may such time period for the completion exceed 54 months from the date of execution of the Grant Agreement.
>
> [Verified Third Party Complaint, Exhibit "D"]

HUD already has granted one extension to the Project schedule. (Verified Third Party Complaint, Exhibit "L".). Under the HUD grant extension, all construction on all housing projects funded by the Hope VI grant must be completed by December 31, 2006. Id.

Failure to proceed forward with the first phase of construction on a timely basis will result in NHA's noncompliance with the dates set forth in Hope VI Quarterly Report and the "checkpoint schedule" set forth therein. HUD's remedies for noncompliance include, but are not limited to, a reduction in funding or rescission of the Hope VI grant. (Verified Third Party Complaint, ¶ 43.). And noncompliance with the schedule for the first phase of the Hope VI grant could, as noted above, have a cascading effect on compliance with subsequent construction phases, because of the close coordination required by the construction schedule.

In short, the pendency of the State Court proceedings, if not enjoined by this Court, will subject NHA to irreparable harm, by likely delaying the financing and commencement of construction of Phase I of the Hope VI project until well into 2004, thereby severely disrupting the construction schedule of much needed affordable housing and immediately threatening NHA's present and future capacity to comply with the terms of the Hope VI grant.

**3. The preliminary and permanent injunction, if granted, will not harm the Appellants in the State Court proceedings**

The preliminary and permanent injunction if granted, would cause minimal, if any, harm to the interests of the Appellants. It will be recalled that Appellants have challenged the HMFA 2002 tax credit regulation as well as HMFA' allocation of tax credits to eleven developers of affordable housing in New Jersey's urban areas. The injunctive relief sought in the instant action would not affect any of the Appellants' federal as well as State Law claims in State Court, *except to the extent that Appellants' claims affect the Newark Hope VI Revitalization Plan, including the West Kinney Gardens/Hope VI Project in the City of Newark that is already under this Court's jurisdiction.*

The effect of the proposed injunction would be merely to sever from Appellants' state court actions the Newark Hope VI Project, one of the twelve named respondents and one of the eleven tax credit projects that Appellants are seeking to prevent from going forward. Appellants would remain free to vigorously pursue all of their claims in State Court as against the NJHMFA 2002 tax credit regulation and as against the ten remaining developers of affordable housing projects in New Jersey urban areas who were recipients of NJHMFA's 2002 award of tax credits. We repeat: The proposed injunction would restrain Appellants, only insofar as their claims affect the Newark Hope VI Revitalization Plan.

In short, Appellants would suffer little, if any, harm to their asserted interests in the State Court proceedings.

**4. The granting of this action for preliminary and permanent injunctive relief is manifestly in the public interest.**

This Court need hardly be reminded of the vital public interest at stake in this litigation. The Hope VI grant here at issue contemplates the redevelopment and revitalization of approximately 42 acres in the Central Ward of Newark, which served as the former sites of the Stella Wright, Hayes, and Scudder Homes. (Torian Cert., ¶ 11.). This Court has retained jurisdiction over this litigation for the past 14 years, in part, in order to ensure that the rights of the former tenants of these housing projects are protected and that the replacement of lost public housing units proceed forward as expeditiously as possible. The public interest requires no less.

In early 1999, 764 families -- approximately 2,300 individuals -- resided in Stella Wright Homes. Relocations of these residents began in mid-1999 with final moves not completed until August 2001. (Verified Third Party Complaint, ¶ 44; Torian Cert., ¶ 21.). Pursuant to this Court's Order, a relocation plan was developed in consultation with the Plaintiffs and the Court-appointed Master and the Court-appointed expert. The vast majority of the relocated families remain in Newark public housing or hold Section 8 vouchers.

NHA has a waiting list of over 6,000 families and a vacancy rate of approximately 2 percent. The waiting list for Section 8 vouchers contains over 17,000 families and individuals. (Verified Third Party Complaint, ¶¶ 45, 46; Torian Cert., ¶ 23.).

Under the Hope VI revitalization plan, NHA and its private partners will construct 755 units of low-rise, mixed-income rental and homeownership

housing. The construction of the 755 units will not, by itself, solve Newark's affordable housing difficulties. These new affordable units, however, will provide much needed replacement housing for the public housing units lost in the demolition of Stella Wright Homes. Furthermore, these new units will continue the process of transforming the Central Ward of Newark into a stable and economically viable community.

The pendency of the State Court proceedings, by preventing the first phase (and possibly later stages) of the Hope VI revitalization plan from going forward, undermines the accomplishment of the substantial and compelling public objectives of ensuring decent affordable housing and a sustainable community in Newark's Central Ward. For all of these reasons, the issuance of an injunction against the State Court proceedings is manifestly in the public interest.